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Nos. 87-1487,87-1506,
87-1510 and 87-1551

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
*Respondents.*

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CORPORATION FOR PUBLIC BROADCASTING, *et al.*,
*Petitioners,*

v.

CENTURY COMMUNICATIONS CORP., *et al.*,
*Respondents.*

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**Petitioner for Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit**

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## CONSOLIDATED BRIEF OF RESPONDENTS CENTURY COMMUNICATION CORP., *ET AL.* IN OPPOSITION TO THE PETITIONS FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Those Questions suggested by Petitioners are argumentative and evasive. The Questions presented are:

1. Whether FCC regulations which classify speakers and, upon private-party demand, mandate distribution and exhibition-format of the broadcast programming and commercial advertising messages of select class members over respondents' closed-circuit cable television systems, a causal effect of which is displacement and exclusion of other "equally protected" speakers and communications, exceed the constraint imposed, or unlawfully abridge freedoms protected, under the Speech and Press Clause of the First Amendment to the U.S. Constitution.

2. Whether FCC regulations which compel that respondents' cable television systems, without compensation, dedicate a significant portion of their privately owned, finite transmission capacity and electronic distribution facilities to exhibition of the programming and commercial announcements of prescribed television broadcast stations, upon demand of the station licensees, constitute a taking of respondents' property in contravention of the Due Process and Just Compensation Clauses of the Fifth Amendment to the U.S. Constitution.

## LIST OF PARTIES

Joint respondents here, joint petitioners in the court below, each of which owns and operates cable television systems, are:

CENTURY COMMUNICATIONS CORP.
CHASCO CABLEVISION, LTD.
CLEARVIEW CABLEVISION ASSOCIATES II
COLUMBIA ASSOCIATES, L.P.
DANIELS & ASSOCIATES, INC.
LANDMARK CABLEVISION ASSOCIATES
MONMOUTH CABLEVISION ASSOCIATES
MASADA COMMUNICATIONS, INC.
NATIONAL CABLESYSTEMS, INC.
OCB CABLEVISION, INC.
OCEAN ASSOCIATES
RIVERVIEW CABLEVISION ASSOCIATES
ST. CHARLES CATV, INC.
UNITED CABLE TELEVISION CORP.

The stock of respondents Century Communications Corp. and United Cable Television Corp. are publicly traded. All other respondents are privately-held business entities. Collectively, these joint respondents operate more than 200 separate cable television systems throughout the United States serving in excess of 2.5 million subscribing homes.

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Respondents Century Communications Corp., *et al.* (hereinafter "Century" or "respondents"), owners and

operators of cable television systems throughout the United States and the lead petitioners in the court below, oppose those separate petitions of (1) Office of Communication of the United Church of Christ, (2) Corporation for Public Broadcasting, *et al.*, (3) National Association of Broadcasters, and (4) Association of Independent Television Stations, Inc. (hereinafter jointly referred to as "petitioners").[1]

## OPINIONS BELOW

The opinion of the court of appeals, dated December 11, 1987, is reported at 835 F.2d 292 (D.C. Cir. 1987) and reprinted in the Petitioners' Appendix ("App.") at 1a-28a. On January 29, 1988, the same court issued a "clarifying" Order, which is reported at 837 F.2d 517 (D.C. Cir. 1988) and also reprinted in the Appendix at 29a-31a. The D.C. Circuit opinion reviewed the FCC's *Report and Order* of August 7, 1986 adopting must-carry rules, 1 F.C.C. Rcd. 864 (1986) ("*R&O*") reprinted in Petitioners' Appendix

[1] While three of the four petitioners designate Century, *et al.* as respondents, petitioner Office of Communication of The United Church of Christ (No. 87-1487) names here the Federal Communications Commission and the United States as "respondents". Yet United Church's primary contention was below and is here to support the underlying constitutionality of the rules at issue. Its only difference with the FCC is that such rules do not go far enough in detail to satisfy it and the fact that they were designated "interim" (*i.e.*, to expire five (5) years after adoption). The thrust of United Church's petition seems to be that the underlying concept of the must-carry regulations is constitutionally sound and should have been sustained below, at least conceptually, on *statutory* grounds. United Church, we reiterate, is a vigorous promoter of must-carry regulation and stands fundamentally on the side of the FCC in this case.

32a-204a, *reconsid. denied*, 2 F.C.C. Rcd. 3593 (1987), Appendix 205a-330a.

## STATEMENT OF THE CASE

This case involves rulemaking by the Federal Communications Commission ("FCC") which produced a new set of content-based regulations referred to as "must-carry" rules.[2] Century Communications Corp., *et al.*, respondents here but petitioners below, jointly challenged the lawfulness of these rules on a variety of constitutional (First and Fifth Amendment) and statutory grounds, and the court of appeals, finding it necessary to decide only the First Amendment question, vacated the regulations as unconstitutional. The subject petitions followed.

The Court recently has had occasion to review cable television within the framework of franchising by local governmental authority, including market-entry factors, all within the context of First Amendment implications.[3] *Preferred* presented the question of the power of a municipality to require one to obtain a municipal "franchise" permitting installation of a permanent cable television distribution system within the community. More particularly, *Preferred* raised issues relating to the nature of such "franchising" authority and the extent to which cities might go in condition-

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[2] The first set of must-carry rules, which had been effective over two decades, was declared unconstitutional as incompatible with the First Amendment in *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986).

[3] *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, (1986).

ing entry and use of public rights-of-way by a cable operator. Finding there that the activities of cable systems "plainly implicate First Amendment interests", 476 U.S. at 494, the Court, citing *United States v. O'Brien*, 391 U.S. 367 (1968), further noted that "where speech, and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests", 476 U.S. at 495. The Court concluded that those particular issues before it in *Preferred* involved considerably more than just communicative activity in that they also encompassed physical establishment and maintenance of a complex of cable-lines and other facilities over and under public streets and rights-of-way. Remanding that case for a fully developed record, the Court stated:

> We think that we may know more than we know now about . . . the present uses of the public utility poles and rights-of-way and how [the cable operator] proposes to install and maintain its facilities on them.

*Preferred*, 476 U.S. at 495.[4]

*Preferred*, therefore, combined that "element of conduct" (*e.g.*, permanent installation of cable plant within city streets) with "some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspapers" (476 U.S. at 494), thereby joining "in a single course of action" "communicative activity" and "conduct". As such, the

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[4] *See also id.* at 496 (Blackmun, J. concurring) (The Court's opinion in *Preferred* "leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities").

*O'Brien* standard of review plays there a pivotal role in fashioning the parameters of permissible regulation even though the exercise of speech freedom may thereby be *incidentally* restricted. The *Preferred*-type issue is yet to be resolved in any definitive sense by the Court and is one undoubtedly to be revisited.

The instant case, however, raises First Amendment questions quite different and apart from those confronting the Court in *Preferred*. This case involves *only* federal regulation of *communicative* activity via the medium of *established* cable television lines. It is facial content-regulation by Government that is here at issue. That element of relevant "conduct", essential to an *O'Brien* analysis, is nowhere present. Following *Quincy*, the FCC promulgated a new set of "must carry" rules, the purpose and function of which, once again, was directly to control the content and distribution-format of those communications transmitted over cable lines. The rules in question are relatively simple and are codified at 47 C.F.R. §§ 76.5, 76.55, 76.56, 76.58, 76.60, 76.62, 76.64 and 76.66 (1987). They also are reprinted in the Petitioners' Appendix at 177a-187a.

By this current version of must-carry regulation, the FCC again frontally supervises "content" through classifying various speakers and then designating certain speech sources which *must* be distributed and exhibited on a highly favored basis over cable-television media.[5] Specifically, these FCC rules favor:

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[5] *See, e.g.*, Rule §76.62, App. 184a. It is noted that all parties below concurred in the proposition that *all* of the "speech" and *all* of those "speakers" presently or potentially affected by the must-carry rules at issue are *fully* and *equally protected* under the First Amendment.

- The speech of certain "qualified" "local" broadcast licensees over that of "distant" television stations (Rule §§76.5(d) and 76.56).
- The speech of the more popular, financially secure "local" broadcast licensees over that of other smaller, less popular and less affluent "local" licensees (Rule §76.5(d)).[6]
- The speech of "public" (non-commercial) "local" broadcast licensees over that of other local stations, and indeed over all speakers (Rule §76.56(a)(1)).
- The speech of "local" broadcast licensees, provided they satisfy the established "popularity" standard, over that of all non-broadcast speakers regardless of location or popular appeal (Rule §§76.5(d) and 76.56).
- The speech of newly operational "local" broadcast licensees, at least for one year, over the speech of new cable programmers (and indeed over *everyone* except a non-commercial station) (Rule §76.5(d)(ii)).
- The speech of a prescribed quota of local "qualified" television licensees over the discretion of cable operators in their capacity as speaker, editor, arranger and distributor (Rule §76.56(a)(2)).

*See also* Rule §76.58 (App. 182a-83a) whereby the FCC confers itself with the power to resolve all dis-

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[6] *See also Report and Order*, ¶¶144-146, App. 115a-117a.

putes regarding speech distribution and to impose monetary forfeitures upon those who fail to comply with its directives.[7]

The FCC candidly acknowledged that these new regulations constitute a comprehensive supervision of speech activity and that their primary function is directly to intrude upon and compromise editorial discretion.[8] As represented by the *Report and Order* giving birth to these rules:

- "This editorial function whereby cable operators select and tailor their program mix to meet viewer interests or other objectives is akin to that performed by publishers of print media." (*R&O*, ¶120, App. 97a).

- "[W]e recognize must carry rules are a stringent form of regulation that intrude on cable operators' free speech rights" (*R&O*, ¶138, App. 110a-111a).

- "We note that the interim rules are less intrusive on cable operators' editorial discretion than the former rules . . ." (*R&O*, ¶138, App. 111a).

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[7] The Court, we trust, will note the remarkable extent to which the subject petitions *avoid* all discussion of the workings of those rules which are the subject of this case. Their reason is obvious: The stated purpose and methodology of the regulations constitute a *per se* indictment of their lawfulness.

[8] Must-carry does *not*, as such, censor the content of any particular message but rather intrudes to classify speakers and to mandate and supervise the presentation of the speech of designated class-members over cable TV media.

- "[W]e find persuasive the more recent court analyses which conclude that cable's First Amendment rights are subject to a stringent review [as would apply in the case of a newspaper]" (*R&O*, ¶184, App. 141a).

- "Whereas [incidental burdens on speech] are assessed under the balancing standard enunciated in [*O'Brien*], content-based regulations are subject to a far more stringent standard" (*R&O*, ¶185, App. 142a-43a).

- "Like the court in *Quincy*, we recognize that the same *O'Brien* test would apply to newspapers in assessing the constitutionality of a content-neutral rule" (*R&O*, ¶187 n. 150, App. 144a).

- "[The] must-carry rules are configured . . . so that the effects on cable operators' editorial discretion and cable programmers' access to the public are no more severe than necessary . . ." (*R&O*, ¶189, App. 146a).[9]

As was the case with the prior, unconstitutional rules, certain favored licensees of television stations are once more "guaranteed the right to convey their messages over the cable system while [non-broadcast] cable programmers [and *now* "unqualified" local stations] must

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[9] The FCC did *not* further elaborate upon the source of its authority to judge the permissible "severity" of a restraint placed by it on the "cable operators' editorial discretion".

vie for a proportionately diminished number of channels".[10]

The FCC and the court below, reaching dramatically different conclusions, relied upon this Court's *O'Brien* standard as the appropriate test in examining the constitutionality of these regulations.[11] The petitioners here, with the exception of the Office of Communication of the United Church of Christ, similarly assert that *O'Brien* is the appropriate standard of judicial review, but they further urge upon the Court that the D.C. Circuit erred in imposing "an unreasonably heavy evidentiary burden on the FCC to demonstrate" compliance with the *O'Brien* criteria.[12]

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[10] *Quincy Cable TV*, 768 F.2d at 1451. While respondents, each a cable-system operator, assert here an invasion of their editorial discretion, there is the separate constitutional perspective of the independent programmer (including the "unqualified" local station) seeking to distribute its message over the cable medium and who is directly frustrated by that governmental preference officially accorded the favored class of speakers. In both instances, exercise of a constitutionally protected activity is frontally and consciously restricted by a regulation designed to achieve just such end. The crucial question, equally applicable to the "rights" of cable operators and cable programmers alike, is whether the constraint and protections of the First Amendment foreclose such regulation.

[11] The court below took the position that it was "unnecessary" to "resolve [the] vexing question" of the appropriate standard of constitutional review since "the new, scaled-back edition [of must-carry rules] fails to satisfy even the less demanding first amendment test of *United States v. O'Brien* whose use here is advocated by the FCC". *Century*, App. 15a. Nonetheless the appeals court opinion does heavily lean toward *O'Brien* as the appropriate standard (*e.g.*, *Id.*, App. 17a-18a, *and see* App. 31a).

[12] Petition of Corporation for Public Broadcasting, p. i. *See*

Respondents urge, as they have from the outset, that *O'Brien* is inapposite to review of the regulations at bar. All parties appear to agree (or, at least, concede) that if *O'Brien* is perchance an improper standard by which to measure the constitutionality of the FCC's must-carry regulations, the rules must fall as incompatible with the First Amendment.

## REASONS FOR DENYING THE WRIT

### 1. *O'Brien*, On Its Face, Is Inapposite to Review of those FCC Regulations At Issue

That the activity of communication by cable television, in the context of a *Preferred* examination, calls for application of an *O'Brien* standard of review does not mean that such standard is universally to be the test in all matters involving cable and the First Amendment—especially where, as here, it is exclusively *content* regulation that is at issue. In *O'Brien*, the Court reiterated the principle "that a government regulation [of a nonspeech element of *conduct*] may be sufficiently justified [even where First Amendment freedoms are incidentally restricted] if":

(i) "it is within the constitutional power of the Government";

(ii) "it furthers an important or substantial governmental interest";

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*also* Petition of Association of Independent Television Stations, Inc., p. i. The position taken by petitioner United Church is that a mix of statutory obligations imposed on the FCC by Congress takes precedence over these constitutional concerns.

(iii) "the governmental interest is unrelated to the suppression of free expression; and"

(iv) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest".

*United States v. O'Brien*, 391 U.S. at 376-77. Application of an *O'Brien* evaluation requires that *each* of these four criteria be independently satisfied. *Id.* at 377. It is a threshold examination; and, as demonstrated *infra*, must-carry regulation fails at each juncture. Other than the asserted *O'Brien* rationale, neither the FCC nor petitioners suggests a basis upon which to justify direct, content-intrusive regulation of speech and media.

We examine, in order, each of those four (4) *O'Brien* qualifying criteria specifically in the context of the must-carry regulations under review.

A. ***The "Constitutional Power of the Government":*** The first, and most critical, hurdle to be crossed is a showing that the rules *on their face* are presumably constitutional in terms of consistency of purpose and means. This minimally comprehends some preliminary analysis of the regulatory scheme and its mechanics, and a reasoned judgment. Must-carry (*i.e.*, mandating content as well as a facial classification and prioritization of fully protected speech and speakers for distribution and publication over independently owned, fully protected communications media) is, in its most favorable light, presumptively *not* "within

the constitutional power of the Government".[13] The thesis, openly espoused by the FCC, is that Government, provided only that its objective is deemed "reasonable" or "necessary", may directly supervise content to substantively discriminate between equally protected speakers. Such regulation, we submit, is *per se* unconstitutional.[14] Must-carry unquestionably constitutes a form of "censorship".[15] Instead of preliminarily considering the underlying constitutionality

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[13] The avowed function of must-carry regulation, albeit under the cover of a public purpose, is to "restrict the speech of some elements of society in order to enhance" that of the favored licensee class, a concept universally condemned in principle by the Court as "wholly foreign to the First Amendment". *Buckley v. Valeo*, 424 U.S. 1, 49-50 (1976). *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 573 (1983).

[14] While a "compelling" State interest or the application of a relevant "categorization" doctrine *might possibly* serve to justify direct governmental control over the dissemination and reception of protected speech, no such claim has been asserted here by the FCC, the agency relying instead upon a subjective weighing of various "factors" to justify its acknowledged "intrusion" and "restrictions" on the exercise of protected freedoms. The theory, candidly advanced by the FCC, is that the "objective" of its policy sufficiently *outweighs*, and therefore "justifies", the restraint. According to the Commission, it is Government's *purpose* in directly supervising speech and favoring certain speakers that may adequately validate the chosen means—boot-strapping of the most primitive, objectionable variety.

[15] *E.g. Young v. American Mini Theatres*, 427 U.S. 50, 64 (1976) ("The essence of . . . forbidden censorship is content control"). *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974)(A law requiring publication "operates as a command in the same sense as a statute or regulation forbidding [distribution of] specified matter").

of must-carry, as *O'Brien* prescribes, the FCC, without examination or articulation, *assumes* the validity of its regulation. Thereby, that preemptive assessment, which must affirmatively and rationally be resolved if the "balancing" scales of *O'Brien* are to play any further role in the constitutional analysis, is quietly (*i.e.*, without mention) avoided. By so preordaining its judgment and thereby arbitrarily abbreviating the process, the FCC fatally discounts *ab initio* the First Amendment. That which follows only compounds the error.

B. ***The "Substantiality" of the "Governmental Interest":*** The stated "governmental interest" of must-carry is to protect and promote the speech of a select class of broadcast licensees *vis-a-vis* all other speakers. The means chosen to perfect such "interest" is establishment of "qualifying" criteria for entry into the favored class and the award to class members of special distribution rights for their speech. FCC Rule §76.5(d), App. 180a-182a. The court below, combing the agency record, found no requisite "substantiality" of governmental interest nor even a demonstrated "need" for the regulation. To the contrary, it did hold that the rules are "predicated not upon substantial evidence but rather upon several highly dubious assertions. . . ." *Century*, App. 18a. *See also id.* at 4a (finding "that the new must-carry rules are [un]necessary to advance any substantial governmental interest . . ."). Thus, must-carry, in isolation, flunks even this most lenient *segment* of constitutional examination.[16]

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[16] The "substantiality" of the government's "interest", we urge, is demonstrably not a relevant consideration where the

C. ***The Relationship of the "Governmental Interest" to Speech:*** The designated target of must-carry is not any "nonspeech element" of a cable operator's *conduct*, but is rather *speech* (*i.e.*, the operator's exercise of "editorial discretion" in the selection and distribution of protected communications). The FCC concedes that its "must carry rules are a stringent form of regulation that intrude on cable operators' free speech rights" (*R&O*, ¶138, App. 111a), but, according to the agency, "the effects on cable operators' editorial discretion and cable programmers' access to the public are no more severe than necessary . . ." (*R&O*, ¶189, App. 146a).[17] Not only do such representations directly contradict substantial First Amendment values, they constitute here extraordinary admissions of constitutional infirmity.[18] "Con-

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regulation at issue squarely confronts the command of the First Amendment (as here, a direct, content-based intrusion on editorial discretion).

[17] Freely admitting that the rules directly intrude on "free speech rights" and "editorial discretion" thereby frontally restricting these protected freedoms, the FCC does not discuss its underlying authority to adopt such extraordinary regulations. *See, e.g.*, 47 U.S.C. §326—the anti-censorship provision of the Communications Act. The Constitution aside, the Act itself would seem organically to deny the administrative agency such awesome powers.

[18] *Miami Herald Publishing Co.*, 418 U.S. at 258 ("[W]hether fair or unfair [ ] . . . . [i]t has yet to be demonstrated how governmental regulation of [editorial discretion] can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time"). The FCC strays so far afield as to represent: "Like the court in *Quincy*, we recognize that the same *O'Brien* test would apply to newspapers in assessing the constitutionality of a content-neutral rule" (*R&O*, ¶187 n. 150, App. 144a).

duct", in the *O'Brien* sense or context, is nowhere to be found in the must-carry scenario.[19] The focus of the FCC's "interest" is the *direct* supervision of speech distribution and, with even more particularity, the conscious advancement and protection of the speech of an already privileged class.[20] The essential theme of the rule is to favor the speech of a select few and, correspondingly, to suppress that of others. That the FCC may subjectively declare its regulatory goal "noble" or public-interest spirited, even if true, does nothing to cosmeticize or ameliorate the full implications of the First Amendment.[21] Neither may a laudatory purpose, however genuine, obviate here the mandate to track the prescription of *O'Brien*.[22] There

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[19] *See, e.g., Buckley v. Valeo*, 424 U.S. at 16-17 ("Some forms of communication . . . involve speech alone [and] some involve conduct primarily . . ." (*Id.* at 17). And it is only the latter that "reduce[s] the exacting scrutiny required by the First Amendment" (*Id.* at 16)). Must-carry unquestionably comprehends the regulation of "speech".

[20] *See, e.g., C.B.S., Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973). *See also Quincy Cable TV*, 768 F.2d at 1452-53 ("[M]ust-carry rules transfer control to local broadcasters who already have a delivery mechanism granted by the government without cost and capable of bypassing the cable system altogether"). "[A]dvantages [of a broadcast license] are the fruit of a preferred position conferred by the Government . . ." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 400 (1969).

[21] *Houchins v. KQED, Inc.*, 438 U.S. 1, 13 (1978) (Decisionmakers "must not confuse what is 'good', 'desirable' or 'expedient' with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication").

[22] Even conceding there to be some measure of potential merit in the FCC's must-carry regime, such cannot serve to coalesce

is nothing "indirect", "neutral" or "noncommunicative" in the Government's "interest" or in the regulation's application to speech activity.[23] "Neutrality" can hardly be viable contention where the primary purpose of Government is officially to establish and promote, as between equally protected speakers, a preferred class of speaker.[24] This aspect of the rule, standing alone, would appear *per se* to breach as well that venerable principle of Equal Protection Under the Law. *Bolling v. Sharpe*, 347 U.S. 497 (1954). If one class of speaker is to be governmentally created and then favored over other speakers—the *raison d'etre* of must-carry—the scheme is by definition *directly related* "to the suppression of free expression", thus precluding use of an *O'Brien* evaluation.[25] Gov-

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the *O'Brien* standard of *constitutional* review into essentially a public-interest judgment where administrative expertise and agency discretion constitute the weight of authority.

[23] *Compare, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490, 502 (1981) ("[T]he government has legitimate interests in controlling the noncommunicative aspects of the medium . . ., but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects").

[24] The theory of the FCC is that by affirmatively compelling cable distribution of the message of the preferred "broadcast" speaker, unspecified First Amendment "values" will be achieved thereby off-setting the infringement. Such altogether ignores the bedrock principle that the role of the Speech and Press Clause is foremost to foreclose Government from such intrusive regulation, whatever the goal or rationale.

[25] *See, e.g., Consolidated Edison v. Public Service Commission of New York*, 447 U.S. 530, 533-536 (1980) (Even a restriction based on a "compelling state interest" must manifest an inherent "neutrality"). If the "concept that government may restrict the speech of some . . . in order to enhance the relative voice of others is [indeed] wholly foreign to the First Amendment",

ernment, we submit, is *powerless* to favor by substantive regulation the message of one class of speaker over another where both possess equal entitlement to the protections of the First Amendment. The unique mechanics of must-carry—official establishment of a speaker-hierarchy and creation of systematic speech preferentials—would seem therefore to warrant something more than reliance upon *O'Brien*.

D. ***Must-Carry as an "Incidental Restriction on Alleged First Amendment Freedoms":*** There is nothing conceivably "incidental" about must-carry's intended application to and actual effect upon the freedom of speech and press.[26] The *modus operandi* of the rule is directly to govern the make-up and flow of communications over a concededly protected medium pursuant to FCC specifications.[27] The rule was promulgated with the specified purpose of promoting the speech of some and constricting the recognized speech freedoms of others. The Government's calculated objective is to mandate content through the acknowledged, extraordinary device of restricting the

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*Buckley v. Valeo*, 424 U.S. at 49-50, it would seem that this aspect of must-carry regulation would invite some discussion from proponents of the regime. No one (not even the court below) faces up to this glaring infirmity in the regulation.

[26] "Incidental" is defined as "subordinate, nonessential, or attendant in position or significance: occurring merely by chance or without intention or calculation . . .". Webster's *Third New International Dictionary, Unabridged* (1976). The court below, inexplicably, never does consider whether must-carry constitutes merely an "incidental infringement of speech". *See Century*, App. 4a.

[27] "Incidental" does not mean, as the beneficiaries of the rule imply, that the abridgment should, in degree, be subjectively "acceptable" and, therefore, judicially overlooked.

communicator's editorial discretion. Neither is there anything problematic or "alleged" regarding those guaranteed freedoms here at issue. It is indeed the FCC that accurately characterized the subject regulation as a "stringent . . . intru[sion] on cable operators' free speech rights" (*R&O*, ¶138, App. 111a).[28] Thus, there is nothing fortuitous or subliminal about those rights *intended* to be interdicted by must-carry. Government may not contextually contend that the intrusion "is no greater than is essential" without *first* logically finding that the speech restrictions worked by the rule fall only as an "incidental" effect of a legitimate, noncommunicative regulation. To do so is to invert the *O'Brien* process and thereby to immobilize the First Amendment.[29] That restriction placed by must-carry regulation on established First Amendment freedoms is, on its face, intentional, sub-

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[28] Imagine the virility that Mr. O'Brien's defense would have taken on had the Government there acknowledged that a primary (or even secondary) purpose of that law banning destruction of draft cards was to intrude upon and limit his speech freedoms. *Compare O'Brien*, 391 U.S. at 378-381.

[29] The FCC's concept of *O'Brien*, supported by petitioners, is universally to apply agency discretion to assess *all* restrictions on speech freedoms—whether incidental or direct. In such fashion, a law prohibiting intentional mutilation of a draft card is treated identically to a law directly supervising media content. According to this theory, it is only the magnitude of the restraint measured against the regulator's objective that is relevant to the constitutional examination. *Compare Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293, 297 (1961) (Even "sophisticated" regulation "cannot be employed in purpose or in effect to stifle, penalize or curb the exercise of First Amendment rights"). That blunt confrontation of must-carry with the command of the First Amendment is anything (or everything) but "sophisticated".

stantial, direct and communicative—any one of which forecloses, at the threshold, an *O'Brien* justification.[30] When the fact that the rule is facially speaker-partial is added to this calculus, any case the FCC may have had for First Amendment compatibility evaporates.

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It is only when each of the foregoing questions is affirmatively resolved that the decision-maker may properly invoke the scales of *O'Brien* to weigh the relative merits of the Government's "incidental restriction" on "alleged" speech freedoms *vis-a-vis* that "objective" to be achieved by the "presumably constitutional" regulation of "conduct". *O'Brien*, therefore, has nothing whatever to do with a regulation directly and purposefully restricting speech freedoms.[31]

In *O'Brien*, this Court, with exceptional precision, emphasized:

> [T]he Nation has a vital [, constitutionally legitimate] interest in having a system for

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[30] Were "must carry" to be applied conceptually to the print medium, there would be no question but that *O'Brien* is irrelevant. *Miami Herald, supra.* Yet, the FCC, dispelling all doubt as to its novel concept of the First Amendment, insists "that the same *O'Brien* test would apply [equally] to newspapers . . .". *R&O*, ¶187 n. 150, App. 144a.

[31] *See also Elrod v. Burns*, 427 U.S. 347, 362 (1976) (Under constitutional challenge, the burden rests affirmatively upon the government to justify any restraint). Twisting this established order, the FCC, as well as the beneficiaries of the regulation, blithely *assume* First Amendment compatibility thereby shifting *sub silentio* their obligations to those subjected to the abridgment.

> raising armies .... [T]he Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.
>
> [T]he continuing availability of issued Selective Service certificates [is reasonably assured by] a law which prohibits their willful mutilation or destruction. * * * * The [law] prohibits such conduct and does nothing more .... [B]oth the governmental interest and the operation of the [draft card law] are limited to the noncommunicative aspect of [Mr.] O'Brien's conduct.

*O'Brien*, 391 U.S. at 381-82 (citations omitted). The Court thus determined unconditionally, *and at the outset*, that the Selective Service law there under examination was *noncommunicative* in scope and that it furthered reasonably a *constitutionally legitimate* objective. Only after such finding is the door opened to that carefully guarded "balancing" evaluation.[32]

In stark contrast to that "draft card" law at bar in *O'Brien*, the FCC's must-carry regulation is aimed directly and only at *communicative* activity for the express purpose of partially controlling the exercise of *editorial discretion* and, thereby, *content* over a

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[32] The rationale of *O'Brien* is never to disarm the protections of the First Amendment but rather to extend them in context to also entail examination of certain forms of "conduct" where "speech" rights are "alleged" to be implicated (*e.g.*, a symbolic burning of one's draft card with the intention of conveying an anti-war statement). In the FCC's view, *O'Brien* provides a recipe for avoidance of the Amendment's constraint on Government as well as a means to penetrate *directly* those constitutional protections conferred thereunder.

fully protected medium of communication.[33] Must-carry has literally *nothing* to do with the "noncommunicative aspect" of a cable operator's "conduct" nor, for that matter, *anyone's* "conduct".[34] Supervision of content, including, *inter alia*, classification and protection of preferred speakers and explicit control over distribution format, is not rationally to be considered an "incidental" by-product or "accidental" side-effect of the FCC policy. It is the policy![35]

The command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press" is read by the FCC to imply the qualifier, "*except* where such abridgment may be related by Government to a public purpose".[36] Neither *O'Brien* nor any other precedent of the Court supports such inference.[37]

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[33] Only under the most forgiving of examinations could must-carry be considered anything less than *presumptively* unconstitutional.

[34] Neither the FCC nor petitioners ever identifies, or even alludes to, that relevant "conduct" to which the regulation is supposedly directed. Nor do they purport to consider whether the rule may be "communicative" in purpose or reach. Yet, all insist that *O'Brien* is the appropriate standard of review.

[35] Ignoring the essential thesis of *O'Brien*, the FCC relies on the case as substantive "authority" to assert direct regulatory control over purely "communicative" activity—a patent distortion of the Court's holding. Indeed, the general rule, with only rare exception, is that such subject matter is *foreclosed* to regulation. *See supra*, note 23.

[36] Discounting the freedoms of some so as to enhance those of a favored class—the slant which the FCC places upon this constitutional issue—is the very antithesis of First Amendment principle.

[37] Throughout its *Report and Order*, the FCC places great

The FCC construes *O'Brien* to confer upon it a broad, virtually unfettered discretion to assert jurisdiction over communicative functions and to apportion the values of the First Amendment, all bounded by little more than the agency's own prognostic powers and momentary perception of the public interest.[38] This, at best, is constitutional folly. Whatever *O'Brien* (or its progeny) may say or mean, it is not a ticket to undermining the potency of the First Amendment.

Therefore, *O'Brien* can play no role in the constitutional analysis of a restraint consciously placed on the exercise of fully protected speech freedoms under conditions where, as here, the restriction is *direct, substantial* and *communicative* in both application and effect. And without the asserted *O'Brien* rationale, the FCC rules at issue are bare of purported justification from any quarter. Thus, the abridgment of

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emphasis upon the fact that its must-carry program is "interim" since it currently specifies a sunset (*i.e.*, five years following adoption), and it urges that this limited life of the intrusion is constitutionally significant. *R&O*, ¶¶136-38 (App. 109a-111a), ¶188-89 (App. 145a-46a). Respondents know of no precedent or rationale suggesting that an abridgment of one month or five years is constitutionally more palatable than one of unspecified or open-ended duration. It is the *act* of abridgment that is the focal point of the constitutional examination. If Government has the authority to abridge First Amendment freedoms for five years, then it follows that such abridgment may be extended or renewed under the same authority. *See, e.g., Report and Order, Separate Statement of Commissioner James B. Quello*, App. 194a ("I want to make absolutely clear that I will use my best efforts to block any sunset of our must-carry rule . . .").

[38] Neither the FCC nor petitioners even consider that "constraint" squarely placed by the First Amendment upon the agency's jurisdiction. *Compare C.B.S., Inc. v. Democratic National Committee*, 412 U.S. 94, 114 (1973).

must-carry is, on this record, unconstitutional *per se* as incompatible with the First Amendment.[39]

**2. The Court Below Reached the Correct Conclusion, and Indeed the Only One it Could, on the First Amendment Question**

The fundamental flaw underlying all of the subject petitions is that each assumes, without articulation, that licensees of television broadcast stations, as First Amendment speakers, are entitled to uniquely favorable treatment solely because of their status. That underlying assumption is wrong; and, indeed, it is the converse thesis which this Court has consistently applied. A broadcaster's privileged occupancy of the scarce, limited spectrum justifies and excuses a diminished First Amendment status, since "[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 390 (1969).[40] *See also National Broadcasting Co. v. United States*, 319 U.S. 190, 226-27 (1943); *Columbia Broadcasting Sys-*

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[39] *See, e.g., S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based").

[40] This Court, albeit in a copyright context, has functionally equated cable television reception and distribution of broadcast signals to that of a television viewer. *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 400 (1968) ("The function of CATV systems has little in common with the function of broadcasters .... CATV systems receive programs and carry them by private channels to additional viewers" (footnotes omitted)). *See also, Teleprompter Corp. v. C.B.S.*, 415 U.S. 394, 408 (1974); *and see Lilly v. United States*, 238 F.2d 584, 587 (4th Cir. 1956), (Cable service is "a mere adjunct of the television receiving sets with which it was connected ...").

*tem, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973) ("Because the broadcast media utilize a valuable and limited public resource there is also present an unusual order of First Amendment values."). "[A]dvantages [of a broadcast license] are the fruit of a preferred position conferred by the Government", *Red Lion Broadcasting Co., supra*, 395 U.S. at 400, requiring a balancing of the licensee's rights as a "public trustee", *C.B.S., Inc.*, 412 U.S. at 118.

Petitioners contend, or at least imply, that by virtue of their special status as privileged broadcast licensees entitled to speak via the public's scarce airwaves, they thereby are further conferred with superior First Amendment rights *vis-a-vis* that of the viewer or "ordinary" citizen speaker, *viz.*, the right to demand that their speech be governmentally preferred over that of all other speakers. We are aware of no precedent of this Court condoning a systematic prioritizing by government of, or between, fully protected speech sources.[41] *Compare Buckley v. Valeo*, 424 U.S. 1, 49-50 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ").[42] *See*

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[41] The FCC's must-carry mentality—overt discrimination between speakers—is novel and without parallel to any other media application or context.

[42] *See also C.B.S., Inc. v. Democratic National Committee*, 412 U.S. 94, where the Court, at the instance of the broadcasting industry, established the principle of the licensee's "right to exercise editorial judgment" (412 U.S. at 111) and to accord or deny access to its communications facilities "based on its own journalistic judgment of priorities and newsworthiness" (412 U.S.

*also Minneapolis Star*, 460 U.S. at 592 ("no interest . . . can justify" governmental discrimination between media).

Regulation which, without subtlety, enables one entrepreneur, by simple demand and without charge, to commandeer the media facilities of another for purposes of distribution and publication of commercial speech would seemingly, if not manifestly, create presumptive problems under both the First and Fifth Amendments to the Constitution.[43] Petitioners bother not even to discuss these fundamental flaws inherent in the "must carry" scheme.

Licensees of broadcast television stations, like teachers, peace officers, sanitation workers, publishers and cable television operators (and sometimes even lawyers), unquestionably make a valuable contribution to the commonweal. But such licensees, however privileged or economically advantaged by their governmental grant, do not constitute a media elite elevated above the more pedestrian concerns of the First Amendment. The message of a broadcaster, commercial or otherwise and however entertaining, is constitutionally entitled to no more governmental protection than that accorded all speakers. The fundamental fallacy of the must-carry rule, like those

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at 118). Ironically, the broadcaster petitioners here would have the Court deny cable operators and programmers that same measure of editorial autonomy.

[43] *See, e.g., First English Lutheran Church v. Los Angeles County*, 107 S.Ct. 2378, 2389 (1987). *And see F.C.C. v. Florida Power Corp.*, 107 S.Ct. 1107, 1112 (1987) (Distinguishing, in a "takings" context, between regulations that "require" that access to private property be given to others and those which merely govern "economic relations" between consenting parties).

arguments of the petitioners, is the failure even to consider this bedrock principle of constitutional law.[44]

### 3. There Are No Conflicting Decisions Rendered By Other Federal Courts on the Same Question

Contrary to the assertions of petitioners, there is no conflict among the circuits nor is there any Supreme Court precedent in conflict with the *holding* of the opinion below. The Eighth Circuit's opinion in *Black Hills Video Corp. v. F.C.C.*, 399 F.2d 65 (8th Cir. 1968), petitioners' strongest case in support of their circuit-conflict argument, was repudiated by that same court ten years later. The Eighth Circuit had upheld the FCC's must-carry rules in *Black Hills* on the grounds that "[t]he Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations." 399 F.2d at 69. However, in *Midwest Video Corp. v. F.C.C.*, 571 F.2d 1025, 1056 (8th Cir. 1978), *aff'd. on other grounds*, 440 U.S. 689 (1979), that same court stated:

> [W]e have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access.
>
> If the Commission has any authority to intrude upon the First Amendment rights of cable operators, that authority, as above in-

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[44] Respondents do not recommend the opinion of the court below as representing a model of constitutional analysis or sound reasoning. We urge only that the ultimate result reached was "correct". *See S.E.C. v. Chenery Corp.*, 318 U.S. at 88.

> dicated, is less, not greater than its authority to intrude upon the First Amendment rights of broadcasters.

In a footnote, the Eighth Circuit there limited *Black Hills* to its facts. 571 F.2d at 1054, n. 71.

Nor is there any precedent of this Court arguably upholding the constitutionality of the must-carry rules. Although the Court upheld the FCC's jurisdiction over cable television in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and its preemption of certain state regulation in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), it has never purported even to consider the constitutionality of the cable must-carry rules.[45] To the extent that a First Amendment challenge to cable regulations of a content-character has even been discussed by the Court, the issue was termed "not frivolous" in *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 709, n. 19 (1979).

There is no dispute here as to the FCC's jurisdiction over cable or its authority to preempt state regulation. The only decision made by the court below is that the current must-carry rules which are content-based are "incompatible with the first amendment". *Century*, App. 4a. There is no surviving judicial precedent in conflict with this holding.

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[45] In *Capital Cities*, the Court declined to consider the claim that the FCC's signal carriage rules violate the First Amendment rights of cable operators (467 U.S. at 700, n. 6). Similarly, the Court in *Southwestern* pointedly noted the absence of a constitutional claim in that case (392 U.S. at 181).

## CONCLUSION

The petitions should be denied.

Respectfully submitted,

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